

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0505, State of NH v. Ricardo Navarro, the court on March 25, 2005, issued the following order:

The defendant, Ricardo Navarro, was convicted of four counts of aggravated felonious sexual assault against one victim and two counts of aggravated felonious sexual assault and one count of felonious sexual assault against another victim. The trial court granted the defendant's motion to set aside the verdicts and for a new trial. The State appealed. Following oral argument, we remanded the case to the trial court to clarify the basis for its decision to grant a new trial. In response, the trial court issued an order stating that it had granted the motion as a matter of manifest necessity based on the totality of circumstances at trial.

The State argues that the trial court erred in finding that: (1) any prejudice that resulted from joinder of the charges was the result of accident, mistake or misfortune; and (2) the testimony of the two victims presented in the same trial unduly prejudiced the defendant such that justice required new severed trials pursuant to RSA 526:1. We will assume that these issues have been properly preserved for our review. We affirm.

Questions involved in the application for a new trial are questions of fact; we will uphold a trial court's decision on whether to grant a new trial absent an unsustainable exercise of discretion. State v. Monroe, 146 N.H. 15, 16 (2001); see State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard).

While the State argues that the defendant's failure to request severance prior to trial resulted in his waiver of that issue and therefore prevented the trial court from ordering a new trial with severed charges, we disagree. Under RSA 526:1, a trial court is authorized to grant a new trial when through accident, mistake or misfortune, justice has not been done. The scope of its discretion is not automatically constrained by the defendant's pretrial actions. Cf. Hodgdon v. Weeks Mem. Hosp., 128 N.H. 366, 369 (1986).

The charges in this case were unrelated. Cf. State v. Ramos, 149 N.H. 118, 128 (2003) (related offenses are those based upon same conduct, single criminal episode or common plan). The trial court had the opportunity to observe the demeanor of the witnesses and the jury, and found that the cumulative testimony of the two young victims had a substantial prejudicial effect. See State v. LaBranche, 118 N.H. 176, 177-79 (1978) (dangers of

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prejudice caused by similar charges grounds for severance). Given these findings, the trial court properly exercised its authority to grant a new trial.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**

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